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No. 99-1900

In the Supreme Court of the United States

AGNES KEMPKER-CLOYD, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner timely filed her sexual harassment claim.

2. Whether petitioner alleged facts sufficient for a reasonable jury to find retaliation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unreported, but the judgment is noted at 198 F.3d 246 (Table). The opinion of the district court (Pet. App. 4a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 22, 1999. A petition for rehearing was denied on February 25, 2000 (Pet. App. 29a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Agnes Kempker-Cloyd was hired by the United States Attorney's Office for the Western District of Michigan in 1978. C.A. App. 326. In 1993, she sought to be appointed as U.S. Attorney, *id.* at 943, but the President selected Michael Dettmer for the position. See 140 Cong. Rec. S1504 (daily ed. Feb. 10, 1994). In April 1994, a few months after Mr. Dettmer took office, petitioner lost her parking space to a more senior attorney. C.A. App. 353.

At a meeting in December 1994, petitioner told Mr. Dettmer that she felt that, "on occasion," his comments "ma[de] it seem to the office like [they] had a special or a romantic relationship" and he said things that she thought were "inappropriate." C.A. App. 367. She also mentioned an incident in January or February 1994 in which he had allegedly swatted her on the rear end with papers as she exited an elevator. *Ibid.*; see also *id.* at 992-994. Mr. Dettmer denied petitioner's allegations but apologized to her for any perceived offense he may have caused her. *Id.* at 367. By the close of the meeting, all those present, including petitioner, believed that the matter had been resolved, and Mr. Dettmer and petitioner shook hands. *Id.* at 370, 949, 950, 955. From the December 6, 1994, meeting until May 1995, petitioner believed that Mr. Dettmer "behaved as a perfect gentleman." *Id.* at 370.

In May 1995, the U.S. Attorney's Office moved to a new building and gained several additional parking spaces. Mr. Dettmer proposed that the spaces not be assigned based solely on seniority. C.A. App. 356. Petitioner told her supervisors that she intended to file a discrimination complaint if she was not assured that she would receive one of the new parking spaces. *Id.* at

358. Her supervisors refused to give her that assurance, and, on May 30, 1995, petitioner filed an initial informal Equal Employment Opportunity (EEO) charge of discrimination. *Id.* at 882. Petitioner charged that the proposal not to use seniority to assign the new parking spaces was intended to discriminate against her on the basis of gender and age and to retaliate against her for having complained in the December 1994 meeting of sexual harassment by Mr. Dettmer. *Id.* at 882-885. Petitioner's May 1995 EEO charge did not mention any alleged discrimination (other than the proposed change in parking policy) that occurred after December 1994. See *id.* at 884.

In the course of processing the complaint, EEO counselor Joan Smithson asked petitioner if Mr. Dettmer had done anything to harass her since 1994. In June 1995, petitioner told Ms. Smithson about a May 1995 incident in which Mr. Dettmer declined to pass her as they were walking up the stairs. C.A. App. 388. In August 1995, petitioner filed a formal administrative complaint, which was dismissed by the agency. See *id.* at 965-966.

2. a. On February 6, 1997, petitioner brought the present suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16. After discovery, the district court granted respondent's motion for summary judgment. Pet. App. 25a.

Drawing all reasonable inferences in favor of petitioner, the district court concluded that there was "no evidence in the record" to indicate that the proposed change in parking policy was "any kind of sexual harassment" or that the "reallocation [of parking] was going to be based on gender." Pet. App. 36a, 37a. The court also found that "the record is devoid of any evidence" that the proposal not to use seniority to

allocate parking places was "a retaliatory act" against petitioner. Pet. App. 26a. The court reasoned that "[t]he fact that an employer contemplates making a generally applicable employment decision after a dispute with an employee is insufficient evidence that the consideration was because of the dispute with the employee." *Ibid.*

The court further held that petitioner's claims regarding alleged sexual harassment in 1994 were untimely unless they were part of a continuing course of conduct linked to a timely claim of harassment. Pet. App. 16a, 44a-45a. The court held that the only possible timely claim was the 1995 stairwell incident. *Id.* at 16a-17a, 44a. After examining the evidence, the court concluded, however, that the failure to pass petitioner on the stairway in May 1995 was not sexual harassment and was not linked to acts which allegedly occurred prior to December 6, 1994. *Id.* at 16a-21a. Therefore, the court concluded that petitioner's harassment claim was time barred. *Ibid.*

b. Petitioner appealed the district court's ruling. On November 22, 1999, the court of appeals affirmed in an unpublished, per curiam opinion based on the reasoning of the district court. Pet. App. 1a-3a.

ARGUMENT

The unpublished decision of the court of appeals is correct. The court of appeals' fact-bound ruling that petitioner did not establish a timely claim of continuing sexual harassment does not conflict with any decision of this Court or any other court of appeals. This Court's review is therefore not warranted.

1. Equal Employment Opportunity Commission (EEOC) regulations require an employee to seek informal Equal Employment Opportunity counseling within

forty-five days of the alleged discrimination. 29 C.F.R. 1614.105(a)(1); see also 42 U.S.C. 2000e-12(a). The bulk of the events on which petitioner based her sexual harassment claim occurred in 1994. However, petitioner did not contact an EEO counselor and file a claim until May 1995. Therefore, as the district court explained, petitioner's claim was untimely unless the 1994 events were linked to a timely claim of harassment. Pet. App. 16a, 44a-45a.

Petitioner argues (Pet. 6-14) that the 1994 events were part of a pattern of conduct that included a May 1995 incident in which Mr. Dettmer declined to pass her on the stairway. The court of appeals correctly affirmed the district court's opinion rejecting that argument. Pet. App. 2a-3a; 8a-21a.

To support a continuing violation claim of the kind asserted by petitioner, a plaintiff must establish "some violation within the statute of limitations period that anchors the earlier claims." *Provencher* v. *CVS Pharmacy, Div. of Melville Corp.*, 145 F.3d 5, 14 (1st Cir. 1998). That "anchor violation requirement" demands that the plaintiff prove "a timely act forming part of and exposing a pattern of actionable sexual harassment." *Ibid.* As the district court and the court of appeals concluded, petitioner failed to establish an anchor claim because the 1995 incident could not support a claim of sexual harassment and was, in any event, not sufficiently closely connected to the 1994 conduct. See Pet. App. 2a-3a, 20a-21a.

Drawing all reasonable inferences in favor of petitioner, the courts correctly found that the record could not support the conclusion that the alleged failure to pass petitioner on the stairs in May 1995 was conduct "severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive,"

Black v. *Zaring Homes, Inc.*, 104 F.3d 822, 826 (6th Cir.), cert. denied, 522 U.S. 865 (1997), enough to effectively alter the conditions of employment. See Pet. App. 2a, 20a-21a. The courts further found that the May 1995 incident was not sufficiently linked by time, similarity, repetition, or continuity to the events in 1994 for all of the events to constitute a single course of discrimination. *Id.* at 21a; see *id.* at 3a (adopting district court's reasoning).

Petitioner contends (Pet. 11) that the district court ignored or refused to consider evidence involving the alleged 1994 harassment in considering the May 1995 incident. In its initial, oral opinion in July 1998, however, the district court made clear that the alleged stairwell incident must be examined in light of the alleged prior harassment. See Pet. App. 41a. And, in its subsequent written opinion, the court reiterated that, in reaching its ruling regarding the May 1995 stairwell incident, the court considered petitioner's evidence "in the context of the acts that occurred prior to December 6, 1994." *Id.* at 20a. See also *id.* at 2a ("The district court concluded that, seen in the context of the acts which occurred prior to December 6, 1994, the crowding incident in the stairwell cannot be considered such sexual harassment as to have altered the terms and conditions of [petitioner's] employment.").*

Petitioner disputes (Pet. 9-10) the district court's assessment of the evidence. That factual dispute does

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* Because the district court and court of appeals found that the incident in May 1995 did not constitute sexual harassment, even when viewed in the context of the earlier alleged incidents, petitioner errs in contending that the court of appeals' decision allows an employer to "commit serial acts of sexual harassment with impunity as long as he allows 45 days to elapse between each act." Pet. 8.

not warrant this Court's review, and petitioner's arguments lack merit in any event. Petitioner relies (Pet. 10) on the district court's preliminary assessment in its oral opinion that the May 1995 stairwell incident "gives rise to a potential claim" in light of the alleged harassment "that occurred in 1994." Pet. App. 40a-41a. The court, however, explicitly reserved judgment on that issue pending further review of the record. *Id.* at 44a-45a. After the court "carefully reexamined all of the record evidence referred to by the parties regarding this incident," *id.* at 17a, it correctly concluded that, "in the context of the acts that occurred prior to December 6, 1994, the 'crowding' incident on the stairwell cannot be considered such sexual harassment as to have altered [petitioner's] terms or conditions of employment." Pet. App. 20a.

Petitioner alleged that, during the move to a new building, she and Mr. Dettmer were both in the stairwell at the same time, both carrying boxes. Petitioner felt that he was "following [her] too close." C.A. App. 628. She "asked him if he wanted to pass and he said no." *Ibid.* When they "got to the top of the stairs," according to petitioner, "he continued to shadow [her] all the way down the hall, instead of passing or walking beside [her]." *Ibid.* As the district court observed, petitioner did not allege that Mr. Dettmer touched her, made any disparaging remark, or hindered her in going where she wanted to go; nor did she allege that he was on the stairwell for the purpose of getting too close to her. Pet. App. 20a. The two "were on the stairwell together, at most, for one flight—from the fifth floor to the sixth; and the incident was so insignificant in [petitioner's] perception that she did not even mention it in her initial contacts with [the EEO counselor]." *Ibid.*

The district court properly concluded that there was "no basis for any assumption that Dettmer was not simply being polite when he did not pass [petitioner] on the stairwell, and declining to pass someone on the stairwell, especially when the person is carrying a box, * * * is not an harassing act." Pet. App. 20a. (internal quotation marks omitted). Even granting petitioner all reasonable inferences, the incident was "simply two people being on the stairwell and hallway for a short time together while they were both in the necessary process of moving [into a new building]." *Ibid.* Moreover, by petitioner's own testimony, Mr. Dettmer had been "a perfect gentleman" for the five months preceding the alleged incident. C.A. App. 370, 907. The district court and the court of appeals therefore properly concluded that the record does not provide a reasonable basis to conclude that the stairway incident constituted sexual harassment.

2. a. Contrary to petitioner's contention (Pet. 15-16), the district court also correctly concluded that the record would not permit a reasonable jury to find that consideration of a parking policy that was not based on seniority was intended as retaliation against petitioner. As the district court explained, "the record is devoid of any evidence that the possibility of changing the criteria for allocating parking places was aimed at [petitioner]." Pet. App. 26a. The court reasoned that "[t]he fact that an employer contemplates making a generally applicable employment decision after a dispute with an employee is insufficient evidence that the consideration was because of the dispute with the employee." *Ibid.* "Timing may be an important clue to causation, but does not eliminate the need to show causation—and [petitioner] really has nothing but the

post hoc ergo propter hoc 'argument' to stand on." *Id.* at 27a.

In the court of appeals, petitioner did not challenge the district court's reasoning on this point, and thus any challenge in this Court would not warrant review. See *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999) (refusing to "decide in the first instance issues not decided below").

b. In the court of appeals, petitioner raised two retaliation claims apart from the parking issue—(1) that Mr. Dettmer had failed to pass on to her letters of commendation from the Internal Revenue Service, and (2) that he had issued a letter allegedly reprimanding her. Neither claim warrants review by this Court.

Petitioner did not argue in the district court that the failure to pass on the letters of commendation was unlawful retaliation. Petitioner therefore failed properly to preserve the claim for appellate review. See *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976). In any event, the claim is without merit. Contrary to petitioner's suggestion (Pet. 16-17), the failure to pass on a laudatory letter from a client agency is not the equivalent of a denial of an award or promotion. Moreover, the record shows that petitioner was aware of the IRS letters, because they were mentioned in her 1996 Performance Appraisal Record, which she reviewed and signed. C.A. App. 1142.

Petitioner's contention (Pet. 6, 15, 17) that she suffered a retaliatory reprimand also lacks merit. The district court correctly concluded that the April 1996 letter that Mr. Dettmer sent petitioner was neither a reprimand nor any other kind of adverse employment action that could support a Title VII retaliation claim. Pet. App. 24a. Mr. Dettmer was informed that petitioner had initiated a rumor that he had engaged in a

conspiracy with an FBI agent to suppress negative information that the FBI had allegedly uncovered during its background investigation of him. C.A. App. 962-963. In the April 1996 letter, Mr. Dettmer instructed petitioner that, *if* she was the source of the rumor, she was "to immediately cease and desist with such conduct; otherwise, disciplinary action will follow." Pet. App. 24a; C.A. App. 1155-1156.

To support a claim of retaliation under Title VII, a federal employee must establish that he or she was subjected to an "adverse employment action." *Talley* v. *Bravo Pitino Restaurant, Ltd.*, 61 F.3d 1241, 1246 (6th Cir. 1995). The April 1996 letter did not result in loss of pay or benefits, demotion, change in title, diminished responsibilities, or disciplinary action. C.A. App. 1153-1154. Indeed, the letter did not have *any* employment consequences. *Ibid.* Therefore, the district court correctly held that there was no adverse action to support a Title VII retaliation claim, and the court of appeals properly affirmed the district court's ruling.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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